
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: February 15, 1990
CASE NO. 87-ERA-33

IN THE MATTER OF

GARY HOFFMAN,
COMPLAINANT,

v.

FUEL ECONOMY CONTRACTING AND
OMAHA PUBLIC POWER DISTRICT,
RESPONDENTS.

BEFORE: THE SECRETARY OF LABOR

ORDER TO SHOW CAUSE

The Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982), submitted a [Recommended)[1] Order of Dismissal on May 6, 1988, dismissing this case with prejudice under 29 C.F.R. §§ 18.39(b) and 24.5(e)(4)(i) (1988) on the grounds that "the parties have amicably resolved their dispute." On August 10, 1988, the Secretary issued an Order to Submit Settlement Agreement so that the Secretary could fulfill her obligation under 42 U.S.C. § 5851 (b)(2)(a) to determine whether the 1989, Respondents submitted a copy of the Settlement Agreement.

The Settlement Agreement (settlement) has been carefully reviewed[2] and, with the exceptions discussed below, I find it fair, adequate and reasonable. Paragraph 3 of the settlement prohibits Complainant from "provid[ing] any documents received by and through the litigation process in this case, or any information describing or analyzing the information to the Nuclear Regulatory Commission ("NRC") [or] to any other person, and will not take any action to do anything to suggest or otherwise induce the NRC or any other person, to take any action to review the information received by and through

this case . . . . [Complainant] will [not] take part in or assist in any action, claim, or proceeding on any alleged violation, claim or event testified to by (Complainant) and others during the course of this proceeding . . . . Paragraph 4 provides that "[Complainant] . . . will not voluntarily appear to or for the NRC or any other person as a witness in any proceeding . . . ."

Paragraphs 3 and 4 of the settlement here would restrict Complainant from providing documents or information obtained in the course of this case to the NRC or any other agency. Such documents or information could be relevant and material to law enforcement investigations by the NRC or other agencies, including investigation by the Department of Labor under the ERA or other laws. Paragraphs 3 and 4 would also prohibit Complainant from testifying, taking part in or assisting in any law enforcement proceeding in which alleged violations of the ERA or events related to this case may arise.

I previously considered a similar provision in an ERA case. *See Polizzi v. Gibbs & Hill, Inc*., Case No. 87-ERA-38, Sec. order, July 18, 1989 (copy appended). As I held in *Polizzi*, these provisions would have the effect of drying up channels of information for the Department of Labor in ERA cases and under other laws, as well as for other agencies in carrying out their responsibilities. For the same reasons as set forth in *Polizzi v. Gibbs & Hill, Inc*., slip op. at 5-7, which I adopt and incorporate here, I find paragraphs 3 and 4 of the settlement void as against public policy, to the extent that they would prohibit Complainant from communicating to federal or state enforcement authorities as identified above.

The remainder of the Agreement may be enforceable if "performance as to which the agreement is unenforceable is not an essential part of the agreed exchange." *EEOC v. Cosmair, Inc*., 821 F.2d at 1091 (quoting the Restatement (Second) of Contracts, § 184(l) (1981).) *See also Nicholas v. Anderson*, 837 F.2d 1372, 1375 (5th Cir. 1988) ("[I]f less than all of a contract violates public policy, the rest of the contract may be enforced unless the unenforceable term is an essential part of the contract.") Thus, in *McCall v. United States Postal Service*, 839 F.2d 664 (Fed. Cir. 1988), an employee had settled an action challenging his removal by agreeing that, upon reinstatement for a one year probationary period, he would not appeal any disciplinary action taken against him and also waived his right to file a charge with EEOC. The court held that "even if (the employee's) attempted waiver of his right to file EEOC charges is void, that would not affect the validity of other portions of the agreement." 839 F.2d 664, 666 at *.

Unlike the record before me in *Polizzi*, there is no information in this record from which I can determine whether the Respondents, the parties in whose favor the invalid provisions of paragraphs 3 and 4 would run, intended to agree to the remainder of the settlement if the provisions I have found void, as discussed above, are severed. Accordingly, Respondents will be given an opportunity to show cause why the remainder of the agreement should not be approved and the case dismissed.

Paragraph 8(e) requires that, if Complainant is rehired at omaha Public Power District and believes he is retaliated against again, Complainant will notify Respondents of the alleged retaliation and give them an opportunity to address the problem before taking legal or administrative action. Because a Complainant under the ERA has only 30 days from the date of discrimination to file a complaint with the Department of Labor, I interpret this provision as not restricting Complainant from filing a complaint under the ERA to protect his rights and to notify the Department of Labor of such violations of the Act while Respondents take steps they consider appropriate to resolve the matter.

Finally, I note that paragraph 2 of the settlement may encompass the settlement of matters arising under various laws, only one of which is the ERA. For the reasons set forth in *Poulos v. Ambassador Fuel Oil Co., Inc*., Case No.86-CAA-1, Sec. order, November 2, 1987, slip op. at 2, I have limited my review of the agreement to determining whether its terms are a fair, adequate and reasonable settlement of Complainant's allegations that Respondents violated the ERA. Accordingly, except as limited above, I find the Settlement Agreement to be fair, adequate and reasonable. Respondents may show cause within 30 days of receipt of this order why the provisions of the Settlement Agreement which I have found void, discussed above, should not be severed and the remainder of the settlement approved and this case dismissed with prejudice. Settlement Agreement, paragraph 5.

SO ORDERED.

ELIZABETH DOLE
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Under 29 C.F.R. § 24.6 of the regulations implementing the ERA, an ALJ is authorized to issue only a recommended decision which must be reviewed by the Secretary before it becomes final. settlement is fair, adequate and reasonable. Respondents filed a Request for Reconsideration of Order to Submit Settlement Agreement and for Dismissal on September 7, 1988. On August 4, 1989, the Secretary denied that request, and on September 1,

[2] The case number "88-ERA-33" on the Settlement Agreement appears to be a typographical error. I take administrative notice that case number 88-ERA-33 was assigned to Casey Ruud v. Westinghouse Hanford Co.